86-542

No.

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

DONALD ROBINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where the petitioner had no prior reputation for drug distribution and where a government informant gave him "look alike" methamphetamine which was later distributed, may the petitioner be permitted to plead entrapment to the jury.

LIST OF ALL PARTIES TO THE PROCEEDING

In this case there were other defendants, those defendants were:

Michael Grayson
Charles Moore
Michael Lawless
Charles McKnight

The petitioner is the only defendant raising the issue sought for review. The Lower Court caption was *United States Court of Appeals for the Third Circuit:*

Nos. 85-1214
85-1217
85-1218
85-1222
85-1225
85-1314
85-1391

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Appendix A—Opinion of the United States Court of Appeals for the Third Circuit 1a

No.

In The

Supreme Court of the United States

October Term, 1986

DONALD ROBINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Justices of the Supreme Court of the United States of America:

Donald Robinson, the petitioner, by his attorney, Frank J. Marcone, Esquire, files this Petition for Writ of Certiorari and presents the following:

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is annexed hereto as Appendix A.

STATEMENT OF GROUNDS FOR JURISDICTION

The date of the entry of the opinion filed by the United States Court of Appeals for the Third Circuit was June 30, 1986.

There have been no other orders affecting the issue here presented for consideration.

STATE COURT REFERENCE

There is no State Court issue nor action involved in this petition for writ of certiorari.

ORIGINAL BASIS FOR FEDERAL JURISDICTION

The prosecution averred the petitioner had violated 18 U.S.C. § 1962(c), charging him with conducting and participating, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity and also conspiracy to do the same. (18 U.S.C. § 1962(d).) The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The Third Circuit Court of Appeals had subject matter jurisdiction pursuant to 18 U.S.C. § 1291.

CONSTITUTIONAL PROVISION WHICH THE CASE INVOLVES

The Thirteenth Amendment and the Due Process Clauses of the Fifth and the Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On July 18, 1985, the petitioner and others were indicted and charged with the following crimes:

1. Conspiracy to Distribute and Manufacture Controlled Substances.

2. Possession of Controlled Substances with the Intent to Distribute those Substances.

3. Involvement in a continuing criminal enterprise and violation of RICO, involving 21 U.S.C. 841(a)(1), 21 U.S.C. 846, 21 U.S.C. 848, 18 U.S.C. 1962(d).

On July 23, 1984, the petitioner entered pleas of not guilty.

On January 9, 1985, the trial began before the Honorable Alfred Luongo, President Judge of the Eastern District of Pennsylvania's United States District Court.

On February 21, 1985, The petitioner was found guilty to Counts 1, 2, 6, and 21 of the indictments.

On April 2, 1985, after post trial motions were filed, argued and dismissed, the petitioner was sentenced to five (5) years imprisonment to be followed by five (5) years period of probation.

An appeal was taken to the Third Circuit Court of Appeals on April 26, 1985.

On June 30, 1986, an opinion was filed by the Third Circuit Court of Appeals denying the petitioner pleas for a new trial.

The circumstances which brought about the indictments resulted from the petitioners' association for many years as a member of a motorcycle club. The facts presented by the prosecution showed the petitioner had been a semi-retired but respected older member of a club. He had become distressed with

the younger members use of the club as a means of distributing drugs.

One of the government witnesses reported hearing the petitioner refusing to become involved in the dispute which had arose between two members involved in drug dealing and in saying the club was a "motorcycle club" not a "drug club".

He is a married man, who has been married for twenty six (26) years and is the father of two teenage sons who he is proud to say have never been on a motorcycle.[1] He has worked as an employee of the Philadelphia Electric Company for twenty (20) years.

The evidence showed the petitioner was an occasional user of a drug known as "P.C.P.", but that he did not use a drug known as methamphetamine.

The trial primarily dealt with the manufacturing and distribution of methamphetamine.

The evidence produced at trial depicted a tempest of drug activity swirling about the club. The petitioner however was conspicuous among the co-defendants because of his continuous refusal to become involved in the business of drug distribution. At most, he was accused of receiving gifts of small amounts of "P.C.P." by other club members because they knew he could ill afford the funds to purchase the drug.

The government, in an effort to infiltrate the club, enlisted

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1. The evidence showed the petitioner had suffered an amputation of one leg as the result of a motorcycle accident and that he espoused the dangers of riding a motorcycle.

the services of a man named James DiGregorio, a club member who had become involved in organized crime and who had been convicted of shooting a fellow hoodlum.

DiGregorio was released from prison and given a quantity of "look alike" methamphetamine which resembled the drug but had none of the hallucinogenic qualities. It had been especially prepared by the government in the F.B.I. laboratories.

The petitioner, disgusted with DiGregorio's actions as a drug dealer had been the leading factor in having DiGregorio expelled from the club (prior to his conviction).

DiGregorio admitted from the stand during the trial that he hated the petitioner and would try to cause him to commit a crime the petitioner otherwise would not become involved in.

DiGregorio, after selling a quantity of the false substance to others for large amounts of money (in excess of $50,000) testified he gave $10,000 worth of the substance to the petitioner for the purpose of getting him involved. DiGregorio admitted he neither asked for nor received any money for the substance.

The petitioner admitted receiving the substance, averring he did not want it and that it was left in his vehicle the last night he had seen DiGregorio. (The petitioner was unaware of the great hate DiGregorio bore him.)

The government then produced a witness, one Kenneth Weaver, who testified he had received a small portion of the substance from the petitioner.

The petitioner took the stand in his own defense and testified confirming he received the substance, held it for a long period of time and then gave a small amount to Weaver.

Weaver tested it, found it to be useless as a drug and the petitioner then destroyed the remaining quantity.

The only dispute between the two (2) versions of the incident was that the petitioner denied ever receiving any money from Weaver who claimed he had paid for it.

All other facts were admitted to.

The defense, after the petitioner had testified in expectation of pleading entrapment, admitting to possession and distribution, was forbidden by the Trial Judge to plead the defense of entrapment to the jury.

The court stated because of the conflict of decisions on the issue among the circuits and since the court felt bound by the decision in the Third Circuit, that by the Trial Court's determination, the defense could not be raised.

The Trial Court later stated on the record that the issue necessitated appellate review and definition.

The issue here is that the Court felt the petitioner had not admitted all the elements of the crime and, therefore, should not be permitted to address the jury on the entrapment issue, even though he had planned his defense on that issue and had presented evidence designed for that issue alone.

ARGUMENT AMPLIFYING THE REASONS FOR THE WRIT

There is a clear conflict of decisions by the Circuits which requires review and definition by the Supreme Court in the area of entrapment, and when and how the defense may be pleaded.

Without expanding into the historical basis for the defense

of entrapment, it is averred the defense has been given some redefinition as a result of the much publicized trials resulting from the government inducing well-known political figures to become involved in a game to entice their criminal participation. These cases became somewhat affectionately known as the "Abscam" cases which brought about a series of decisions which now require redefinition in a much less volatile case. The facts of this case provide just that conveyance.

Here, the petitioner had planned his defense on the entrapment issue and had notified the Court and counsel for the government of his defensive position.

The petitioner admitted on the stand that he had received and possessed a substance later to be known as a "look alike" methampetamine. He received it without paying for it and the person who gave it was working for the government as an informant and admitted in his testimony that the petitioner was given the substance because the government operative personally hated the petitioner, and wanted to cause him to commit a crime he otherwise refused to become involved in.

The government operative admitted he had purposefully deceived the petitioner and gave him the substance to induce criminal participation.

The petitioner did not attempt to distribute the substance and months later he gave a small portion to another government informant who thereafter testified he had paid for it. (That was the only area of dispute in the versions testified to.)

The petitioner admitted to distributing the small portion (thereby admitting to all the elements of the crime) and claimed he destroyed the remainder. (This was not disputed.)

Thereafter, prior to going to the jury with the issues, the Trial Court determined the entrapment defense which had been testified to had not satisfied the requirements that all the elements of the crime be admitted.

The petitioner was then forbidden to raise the defense of entrapment and the jury never was given the issue for consideration.

ARGUMENT

In *United States v. Janotti,* 673 F. 2d 578 at 601 (1982), the Third Circuit Court stated:

> ". . . we considered whether an entrapment defense required admission of the relevant mens rae and stated that the entrapment defense requires admission of guilt of the crime charged and all of its elements, including the required mental state." *Quoting United States v. Hall,* 655 F. 2d 512, 514 (3d Cir. 1981).

While *Janotti, supra,* is the law of the Third Circuit, there exists a difference of opinion among the Circuit Courts[2] as to what admissions, if any, a defendant is required to give in order to advance the defense of entrapment. In the Second Circuit the Court held, in *United States v. Mayo,* 705 F. 2d 62, 68 P.4 (1983), that the defendant's testimony as to non-involvement in the crime charged precludes an entrapment defense. However, the *Mayo* Court did not hold that the mens rae must be admitted to. The Fifth Circuit joins the Third Circuit's holding in *Janotti, supra,*

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2. Indeed, the jurists of the Third Circuit were split in their decision in *Janotti, supra. See* dissenting opinion by Justice Aldisert, at pg. 618 of 673 F. 2d.

and requires that a defendant admit the required intent, as well as the acts which constitute the crime. *See United States v. Henry*, 727 F. 2d 1373 (5th Cir. 1984). The Seventh Circuit holds, in *United States v. Liparota*, 735 F. 2d 1044 (1984), that the "acts" must be admitted, however, the issue as to the required mental state admission is not clearly addressed. The *Liparota* Court cites the following Circuits as not requiring damaging admissions as to acts and intent as a pre-requisite for pleading entrapment. *Hansford v. United States*, 303 F. 2d 219 (D.C. Cir. 1962), and *United States v. Demma*, 523 F. 2d 981 (9th Cir. 1975 [Enbanc]), wherein the Court held that a defendant may assert an entrapment defense without being required to concede that he committed the crime charged or any of its elements. While the Supreme Court of the United States has not expressly ruled on this issue, it is asserted here that the *Demma* Court's standard of non-admission is logically compelling. Requiring a defendant to admit guilt in order to advance his defense impinges on his right not to testify at trial and has been rejected by several Courts. *See Crisp v. United States*, 262 F. 2d 68, 70 (4th Cir. 1958).

Thus, if the prosecution's case presents evidence of entrapment, the defendant may still raise the defense, in several Circuits, while denying commission of the crime.

A defendant should be permitted to say, as in *Henderson v. United States*, that:

> "I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped."

Henderson v. United States, 237 F. 2d 169, 171 (5th Cir. 1956).

Nonetheless, while the law is unclear regarding whether the defendant must admit culpability, in this case, the issue has been

resolved since here, the petitioner did admit his involvement.

Only slight evidence is needed to create a factual issue which permits the defense of entrapment to go to the jury. *See United States v. Digg's*, 649 F. 2d 731 (CA9 1981). Instantly, the evidence presented is more than sufficient and, accordingly, the entrapment defense should have been presented to the jury. *See United States v. Watson*, 489 F. 2d 504 at 509 (3d Cir. 1973), which stated:

> "however unreasonable the Judge would consider a verdict in favor of the defendant to be, when the accused shows (1) evidence that the Government initiated the crime, regardless of the amount of pressure applied to the defendant, and (2) any evidence negating the defendant's propensity to commit the crime . . . (them), a defendant is entitled to an entrapment instruction."

In the instant case, the petitioner, Donald Robinson, openly admitted he had received one (1) pound of "look alike" methamphetamine from James DiGregorio, the government informant, (*see* N.T. 23.28 of February 5, 1985.) Further (at N.T. 23.39), petitioner admits distributing "some" of the contraband to Mr. Weaver, and (at N.T. 23.40), he again admits, that he did distribute the "look alike" methamphetamine by giving a portion to Weaver. Despite the clear record showing all the essential elements of entrapment, the trial court refused counsel's request for a jury instruction on the issue, and refused to permit the defense to even argue entrapment. (*see* N.T. 23.85 of February 5, 1985.)

Under the facts of this case the court's refusal to charge the jury on the defendant's theory of the case constituted reversible error and requires that a new trial be granted.

The record is clear that the petitioner "never wanted to handle anything—and, didn't like meth." (*See* N.T. 5.131, 5.123 of January 10, 1985.) The petitioner, "didn't want to deal anything", "didn't want anything," (*see* N.T. 9.61, 9.62 of January 16, 1985) he "never handled any drugs" (N.T. 9.92, 9.96, 9.97); further, the petitioner insisted that the motorcycle club "is a motorcycle club and not a drug club" (N.T. 9.99). All testimony indicates that the petitioner dealing of drugs was "very unusual" and totally "out of character"[3] (*see* N.T. 18.224, 18.241), further, that the look alike methamphetamine was *given* the petitioner by the government's informant (*see* 9.161, 9.162 of January 16, 1985), and was later purchased, for $2,400 by a Mr. Weaver, also a government informant (*see* N.T. 18.252, 18.253 of January 29, 1985).[4]

After the Court refused to permit the defense of entrapment, Donald Robinson asserted he had the right to have the jury instructed as to a lesser included offense. Since he was charged with the offense of possession of methamphetamine and with the intent to deliver the same, the lesser included offense was the charge of possession of methamphetamine alone. As support for that request, the petitioner directed the Trial Court's attention to the case of *Virgin Islands v. Bedford,* 671 F. 2d 758 (3d Cir. 1982), where the lesser included offense, even though not mentioned in the indictment was considered.

---

3. On cross examination, the government witness, Weaver, testified he had never heard of Robinson distributing drugs while he knew him, that he never had purchased any drugs from Robinson and that this singular transaction was "totally out of character" with Robinson's prior activities.

4. It is not at all clear that this conviction can stand considering the mandate of *United States v. West,* 511 F. 2d 1083 (3d. C.A. 1975), wherein it was held improper for one (1) government informer to supply the defendant with drugs which were subsequently purchased by a government agent. Petitioner concedes that Mr. Weaver was not acting as government informer when he received the "look alike" methamphetamine, however, the fact that Mr. Weaver subsequently became a government informer within a short time after the "sale" raises serious doubts as to the validity of this conviction.

The Court had refused to conclude the delivery intent was admitted to and therefore excluded the entrapment defense. The trial court then came to two different conclusions. First as to entrapment, the Court said Robinson had not admitted the requisite distribution and therefore was barred from using the defense. By that conclusion, the instruction as to the lesser included offense should apply. The Court however reversed itself and said the petitioner had admitted to delivery and the lesser included offense of possession did not apply. This has left us now with two distinct conclusions contradicting themselves.

CONCLUSION

The petitioner, therefore, now requests this Court to grant a writ of certiorari to review the new evidence and the law. He contends he admitted to all the elements of the charges against him, including delivery of the "look alike" methamphetamine. Therefore, even the requisites of *Janotti, supra*, were met and by the standard announced in the Third Circuit (where this case was tried) he must be given a new trial.

If this Court is not satisfied the evidence bears out his position, then this Court must find he at least admitted to the lesser included offense of possession.

In either posture, the Trial Court erred in refusing the entrapment argument and committed prejudicial error requiring a new trial be ordered.

Respectfully submitted,

FRANK J. MARCONE
Attorney for Petitioner

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1214, 85-1217, 85-1218,
85-1222, 85-1225, 85-1314 and 85-1391

UNITED STATES OF AMERICA

v.

MICHAEL GRAYSON, a/k/a White Bear,
Appellant

UNITED STATES OF AMERICA

v.

CHARLES MOORE, a/k/a Uncle Charlie,
Appellant

UNITED STATES OF AMERICA

v.

MICHAEL LAWLESS, a/k/a Caveman,
Appellant

UNITED STATES OF AMERICA

v.

CHARLES MC KNIGHT, a/ka/ McNut,
Appellant

UNITED STATES OF AMERICA

v.

DONALD ROBINSON, a/k/a Dino,
Appellant

Appendix A

UNITED STATES OF AMERICA

v.

MICHAEL GIORDANO, a/k/a Bugsy,
Appellant

UNITED STATES OF AMERICA

v.

JOHN GAVIS, a/k/a Wacker John,
Appellant

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania
(D.C. Crim. No. 84-00303-01)
(D.C. Crim. No. 84-303-9)
(D.C. Crim. No. 84-00303-07)
(D.C. Crim. No. 84-00303-02
(D.C. Crim. No. 84-00303-03)
(D.C. Crim. No. 84-00303-08)
(D.C. Crim. No. 84-00303-10)

Argued: February 12, 1986

Before: HIGGINBOTHAM and STAPLETON,
Circuit Judges, and TEITELBAUM,
District Judge.*

(Filed June 30, 1986)

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*Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix A

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Appendix A

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

On this appeal, we must decide the following questions:

1) Whether use of a prior conspiracy conviction as a predicate act for a subsequent Racketeer Influenced and Corrupt Organization ("RICO"), 18 U.S.C. § 1962(c), prosecution and a subsequent continuing criminal enterprise ("CCE") prosecution violates the double jeopardy clause of the fifth amendment to the United States Constitution;

2) Whether the double jeopardy clause bars cumulative punishments for a conspiracy predicate act and for the CCE offense; and

3) Whether the district court erred in its instruction to the jury when defining "pattern of racketeering" for RICO purposes. 18 U.S.C. § 1961(5).

We hold that, on the facts of this case, prosecution for RICO and CCE, after an earlier prosecution for a conspiracy predicate act, did not violate the double jeopardy clause. Part II-A *infra*. We hold that the double jeopardy clause was violated by consecutive sentencing on the CCE offense, 21 U.S.C. § 848, and its conspiracy predicate offense, 21 U.S.C. § 846, as to

appellant Michael Grayson. Thus, we remand Grayson's case to the district court for resentencing. Part II-B *infra*. We further hold that, on the facts of this case, the district court's refusal to instruct the jury that a connection must be shown among predicate offenses to prove the "pattern of racketeering" activity was, if error, harmless. Part III *infra*. The other challenges raised[1] by appellants, we find to be without merit and require no discussion. Thus, we affirm appellants' convictions and sentences in all other respects.

I.

On July 18, 1984, a federal grand jury returned an indictment against ten members and associates of the Pagan Motorcycle Club ("PMC"). Charges were brought under provisions of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962(c) and (d), alleging substantive violation of and conspiracy to violate the statute. In addition, several of the defendants were charged with various violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 841(a)(1) and (d); 846; 848.[2]

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1. The other contentions are summarized in an appendix to this opinion.

2. Counts one and two of the indictment charged all ten defendants with substantive RICO violation, 18 U.S.C. § 1962(c), and RICO conspiracy, 18 U.S.C. § 1962(d). Michael Grayson was charged with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 (Count three); possession with intent to distribute methamphetamine, 21 U.S.C. § 841(a)(1) (Counts four and five); and attempt to possess with intent to distribute methamphetamine, 21 U.S.C. § 846 and 18 U.S.C. § 2 (Counts six and seven). Charles McKnight was charged with engaging in a continuing criminal enterprise (Count eight); attempt to possess with intent to distribute methamphetamine (Counts six and seven);

Appendix A

Eight of the ten defendants indicted, including all seven appellants here, were tried before a jury between January 7, 1985 and February 12, 1985.[3] On February 15, 1985, the jury returned its verdicts, finding all defendants guilty on all counts except that the jury found Grayson not guilty on Count five (possession with intent to distribute methamphetamine); McKnight not guilty on Count nine (distribution of phencyclidine); Giordano not guilty on Count thirty (attempt to manufacture phencyclidine); and the

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distribution of phencyclidine, 21 U.S.C. § 841(a)(1) (Counts nine and ten); possession with intent to distribute methamphetamine (Counts eleven, fifteen, sixteen, seventeen, and eighteen); manufacture of phencyclidine, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Counts twelve, thirteen, fourteen, and nineteen); and possession of piperidine with intent to manufacture phencyclidine, 21 U.S.C. § 841(d) (Count twenty). Donald Robinson was charged with attempt to possess with intent to distribute methamphetamine (Counts six and twenty-one). Michael Lawless was charged with manufacture of phencyclidine (Count nineteen); and possession of piperidine with intent to manufacture phencyclidine (Count twenty-nine). Michael Giordano was charged with attempt to manufacture phencyclidine, 21 U.S.C. § 846 and 18 U.S.C. § 2 (Count thirty); possession with intent to distribute phencyclidine (Counts thirty-one and thirty-three); distribution of methamphetamine (Counts thirty-two and thirty-four); and distribution of phencyclidine (Counts thirty-five and thirty-six). Charles Moore was charged with possession of piperidine with intent to manufacture phencyclidine (Count twenty). John Gavis was charged with manufacture of phencyclidine (Counts twelve and thirteen); and possession of piperidine with intent to manufacture phencyclidine (Count thirty-seven). Grayson App. at 1a-76a.

3. Two of the defendants named in the indictment reached a change of plea agreement with the United States prior to trial. One defendant became a witness for the government at the trial. Grayson Brief at x.

eighth defendant, Richard Richter,[4] not guilty on Count twenty-two (possession with intent to distribute methamphetamine). Sentencing took place on April 2, 1985 and May 17, 1985, and individualized sentences of four to fifteen years of imprisonment were imposed.

At trial, the government presented approximately 43 witnesses and more than 100 exhibits, including numerous tape recorded conversations, photographs and documents. The principal witnesses on behalf of the government were nine former members and associates of the Pagan Motorcycle Club ("PMC"). Viewed in the light most favorable to the government, *see Glasser v. United States*, 315 U.S. 60, 62 (1942), the evidence might be summarized as follows. PMC, an enterprise with chapters throughout the East Coast of the United States, conducted its affairs through the manufacture and distribution of controlled substances, principally methamphetamine and phencyclidine. Defendants were, at one time or another, regular members of PMC. Defendants participated, directly or indirectly, in the affairs of PMC through the manufacture, receipt, concealment, purchase and sale of methamphetamine and phencyclidine, as well as various chemicals and ingredients used to manufacture methamphetamine and phencyclidine.

II.

This case presents questions regarding the double jeopardy implications when prior convictions are used as predicate offenses to support a RICO[5] charge and a

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4. At the time of sentencing, Richard Richter was a fugitive and was not sentenced, thus, he is not a party in these appeals. Government Brief at 7.

5. To be convicted under RICO, evidence must show that defendant participated in affairs of an enterprise through a

CCE[6] charge. Because resolution of this issue involves the interpretation and application of legal precepts, our standard of review is plenary. *See United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir. 1985); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981).

The Double Jeopardy Clause of the Fifth Amendment declares: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . ." U.S. Const. Amend. V. The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The test for determining whether two offenses are "the same" or are distinguishable and allow for cumulative punishment was established in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The applicable rule under *Blockburger* "is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. The

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pattern of racketeering activity, which requires commission of at least two predicate crimes. *See* 18 U.S.C. §§ 1961(5), 1962(c).

6. To be convicted under CCE, evidence must show that defendant engaged in a continuous series of federal drug violations, which requires three or more predicate crimes. 21 U.S.C. § 848. Section 848 also requires that the defendant acted in concert or in conspiracy with five or more persons from which the defendant obtained substantial income or resources.

rule stated in *Blockburger*, was applied as a rule of statutory construction to help determine legislative intent. *Garrett v. United States*, ___ U.S. ___, 105 S. Ct. 2407, 2412 (1985). The Supreme Court, thus, has recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history. *Id.* In essence, the ultimate question of whether two offenses are the same, under *Blockburger*, is one of legislative intent. *Id.*

A.

We turn first to Grayson's contention that he was subjected to successive prosecutions. At trial, the government introduced proof of prior convictions of defendant Grayson. Grayson App. at 288a and 294a. On October 14, 1977, Grayson was convicted in the United States District Court for the Eastern District of Pennsylvania of conspiracy to manufacture methamphetamine. Grayson App. at 288a. On November 19, 1983, Grayson was convicted in the United States District Court for the District of Maryland of conspiracy to manufacture phencyclidine. Grayson App. at 294a. Proof of both convictions was offered as evidence of the requisite predicate acts under both Count two, the RICO count, and Count three, the CCE count, as well as the remaining elements of the CCE. Grayson argues that the admission of evidence of these prior convictions as to both Counts two and three violated his right to be protected from double jeopardy.

1. *RICO Substantive and Predicate Acts*

The language and legislative history of RICO indicates little doubt that Congress, in enacting RICO, sought to allow the separate prosecution and

punishment of predicate offenses and a subsequent RICO offense. RICO's statutory language indicates that Congress sought to supplement, rather than supplant, existing crimes and penalties. Section 1961(5) provides that a:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years *(excluding any period of imprisonment) after the commission of a prior act of racketeering activity.*

18 U.S.C. § 1961(5)(emphasis added). This language suggests that Congress envisioned the situation where a defendant is convicted and sentenced for a racketeering act and subsequently charged with a RICO violation based on the prior conviction. *United States v. Persico*, 620 F. Supp. 836, 841 (S.D.N.Y. 1985). *See United States v. Hawkins*, 658 F.2d 279, 287-88 (5th Cir. 1981); *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

This interpretation of the language of RICO is fully supported by the statute's legislative history:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing *new penal prohibitions, and by providing enhanced sanctions and new remedies* to deal with the unlawful activities of those engaged in organized crime.

Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 stat. 922, *reprinted in* 1970

U.S. Code, Cong. & Ad. News at 1073 (emphasis added). *See also United States v. Phillips*, 664 F.2d 971, 1009 n.55 (5th Cir. 1981), *cert. denied*, 459 U.S. 906 (1982) ("The legislative history of RICO demonstrates that Congress intended to permit the imposition of cumulative sentences for both RICO offenses and the underlying predicate offenses. [citations omitted]. Thus, a defendant may be convicted for the predicate acts which form the basis for the RICO charge and later charged under RICO. [citations omitted]. A conviction under RICO does not, therefore, grant immunity for the offenses charged as the predicate acts of racketeering activity. [citations omitted]".)

Several other courts of appeals have uniformly adopted this interpretation that Congress intended separate convictions or consecutive sentences for a RICO offense and the underlying predicate offense. As the Ninth Circuit observed in *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980):

> There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.

Rone, 598 F.2d at 571. *Accord Hawkins*, 658 F.2d at 287; *Aleman*, 609 F.2d at 306; *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir. 1980), *cert. denied*, 449 U.S. 833 (1981). Indeed, the courts have repeatedly held that separate prosecutions and cumulative punishments for a RICO offense and its underlying predicate offenses are not inconsistent with the double jeopardy clause. *See e.g., Phillips*, 664 F.2d at 1009; *Boylan*, 620 F.2d at 361; *Hawkins*, 658 F.2d at 288; *Aleman*, 609 F.2d at 306. In light of the foregoing, we conclude that Congress intended separate prosecutions and cumulative punishments for predicate offenses and substantive RICO.

Having determined that Congress intended to permit prosecution for both the predicate offenses and the RICO offense, we must now determine whether prosecution for a RICO offense after an earlier prosecution for a predicate offense is constitutional under the double jeopardy clause. The critical inquiry is whether a RICO offense is considered the same offense as one or more of its predicate offenses within the meaning of the double jeopardy clause.

A RICO offense is not, in a literal sense, the "same" offense as one of the predicate offenses. *United States v. Persico*, 620 F. Supp. at 844. A RICO offense requires the jury to find that the defendant participated in affairs of an enterprise through a pattern of racketeering activity, which requires commission of two predicate offenses within a ten-year period. 18 U.S.C. §§ 1962, 1961(5). To prove a RICO violation, therefore, requires proof of a second racketeering act. *United States v. Persico*, 620 F. Supp. at 844. Further, the predicate offenses and the RICO offense are intended to deter two different kinds of activity -- "racketeering" on the one hand and narcotics violations on the other. *United States v.*

Boldin, 772 F.2d 719, 729 (11th Cir. 1985). Clearly, a RICO offense may be based in part upon a predicate offense for which the defendant has already been convicted and served a sentence. *Hawkins*, 658 F.2d at 288. Hence, successive prosecutions for a RICO offense and its underlying predicate offenses are not inconsistent with the double jeopardy clause. Consequently, the admission of Grayson's two prior convictions as predicate acts for the RICO substantive charge did not violate the Double Jeopardy Clause.

2. *CCE and Predicate Acts*

To establish guilt under the continuing criminal enterprise statute, 21 U.S.C. § 848, the government must prove: 1) a felony violation of the federal narcotics law; 2) as part of a continuing series of violations; 3) in concert with five or more persons; 4) for whom the defendant is an organizer or supervisor; 5) from which he derives substantial income or resources. *United States v. Schuster*, 769 F.2d 337, 340 (6th Cir. 1985); *United States v. Lurz*, 666 F.2d 69, 75 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982). The statute requires an agreement in a design or plan as well as concerted activity. *Jeffers v. United States*, 432 U.S. 137, 148-49 (1977). The predicate acts here, conspiracy to manufacture methamphetamine and phencyclidine, are based on the conspiracy statute at 21 U.S.C. § 846. This statute punishes attempts or conspiracies to violate the drug laws.

Grayson urges that his prior convictions under section 846 bar his successive prosecution for a CCE offense. Recently, in *Garrett v. United States*, ___ U.S. ___, 105 S. Ct. 2407 (1985), the Supreme Court considered the question whether the government could prosecute CCE charges based in part on conduct for which the defendant had been convicted previously for

importing marijuana. Garrett was indicted in March 1981, in the Western District of Washington and subsequently pleaded guilty to one count of importation of marijuana. Thereafter, in July 1981, Garrett was indicted in the Northern District of Florida for conspiring to import marijuana, 21 U.S.C. §§ 952, 960, 963, conspiring to possess marijuana with intent to distribute, 21 U.S.C. §§ 841, 846, using a telephone to facilitate illegal drug activities, 21 U.S.C. §§ 963, 846, 843(b), and engaging in a continuing criminal enterprise, 21 U.S.C. § 848. In the Florida trial, evidence underlying Garrett's prior conviction in Washington was introduced to prove one of three predicate offenses that must be shown to make out a CCE violation. Garrett was convicted on the CCE count, the two conspiracy counts, and the telephone facilitation count. Garrett was sentenced to 40 years' imprisonment and a $100,00 fine on the CCE count, the prison term being concurrent with the prison terms on the other counts but consecutive to the prison term from the Washington conviction. Rejecting Garrett's contention that his Washington conviction barred the subsequent CCE prosecution in Florida, the Eleventh Circuit held that the Washington offense and the CCE offense were not the same under the double jeopardy clause, and hence that successive prosecutions and cumulative sentences for these offenses were permissible.

In its review of the double jeopardy question, the Supreme Court considered whether Congress intended that the CCE be a separate offense from the underlying predicate offenses. The Court held, after extensive legislative analysis, that "[t]he language, structure, and legislative history of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, however, show in the plainest way that Congress intended the CCE

provision to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate offenses." *Garrett*, ___U.S. at ___, 105 S. Ct. at 2412. The Court noted that "it would be illogical for Congress to intend that a choice be made between the predicate offenses and the CCE offense in pursuing major drug dealers." *Id.* at 2415.

The Court next considered whether prosecution for a CCE offense after an earlier prosecution for a predicate offense is constitutional under the Double Jeopardy Clause. The Court held that it did not violate the Double Jeopardy Clause to prosecute the CCE offense after the prior conviction for one of the predicate offenses. The CCE offense is not the "same" offense as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause. *Id.* The Supreme Court then noted that "in order to properly analyze the successive prosecution issue, we must examine not only the statute which Congress has enacted, but also the charges which form the basis of the [g]overnment's prosecution here." *Id.* at 2415-16. As a result, the Court held that because the Florida CCE charge included acts which took place after the date of the Washington indictment, the CCE offense charged had not been completed at the time the Washington indictment was returned; hence, the evidence of the Washington importation offense could be used to prove one of the predicate offenses for the Florida CCE offense. *Id.* at 2419.

Although *Garrett* involved a substantive predicate offense rather than a conspiracy predicate offense, the rationale and conclusions of the opinion are equally applicable to a prior conviction for a predicate conspiracy offense. Section 848(b)(1) of Title 21 defines the required predicate offenses of a CCE as violations of any provision of either subchapters I or II of Chapter

13 of Title 21 "the punishment for which is a felony." Under the plain terms of the statute, therefore, conspiracies under 21 U.S.C. § 846 for which the punishment is a felony clearly qualify as predicate acts. Moreover, in that portion of *Garrett* dealing with the issue of successive prosecutions, *Garrett*, ___ U.S. at ___, 105 S. Ct. at 2411-19, the Court consistently refers only to "predicate offenses" and does not limit, in any way, its holding to substantive predicate offenses. It was only in reference to the cumulative punishment issue that the Court in *Garrett* referred to *Jeffers v. United States*, 432 U.S. 137 (1977), and distinguished conspiracies from substantive predicate offenses.[7] *Id.* at 2420.

The case of *Jeffers* is not to the contrary. In *Jeffers*, a plurality opinion, the Court was presented with successive prosecutions for conspiracy under 21 U.S.C. § 846 and continuing criminal enterprise under 21 U.S.C. § 848. However, the Court never directly decided the issue of the propriety of successive prosecutions, holding instead that because the defendant had objected to the government's motion to jointly try the cases "his action deprived him of any right that he might have had against consecutive trials." *Jeffers*, 432 U.S. at 154. Furthermore, in *Jeffers*, unlike both *Garrett* and the present case, the

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7. The issue of cumulative punishment on the prior conspiracy conviction and CCE is discussed below. At this point, it is noted that there is a distinction between successive prosecutions and cumulative punishments in double jeopardy analysis. United States v. Gomberg, 715 F.2d 843, 850 (3d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984). *See also* Jeffers v. United States, 432 U.S. 137, 154 n. 23 (1977)("Different considerations govern the propriety of addressing the cumulative-punishment issue, since petitioner, ... did argue implicitly that separate trials would be permissible.")

two offenses -- the conspiracy and the CCE -- covered the exact same time period and, according to the government "much of the evidence planned for the § 848 trial was based on the same transactions as those involved in the § 846 case." *Id.* at 142.

Here, as in *Garrett*, the CCE charge included numerous offenses both distinct from the two prior conspiracy convictions as well as subsequent to the date of indictment in each of the prior cases. Count three, the CCE charge against Grayson, occurred "[f]rom in or about March 1977 to in or about November 1983." Grayson App. at 42a. The prior indictment against Grayson in the Eastern District of Pennsylvania was filed on May 19, 1977, and the conspiracy of which Grayson was convicted existed from "on or about March 29, 1977, to on or about May 4, 1977." Grayson App. at 285a. The District of Maryland indictment was filed on February 23, 1983, and Grayson's conspiracy conviction there covered the period December 1982 "up to and including on or about January 28, 1983." Grayson App. at 289a. The indictment here alleges a total of 26 predicate acts against Grayson in Count two, the RICO charge, all of which the government also relied upon as predicates for the CCE charge in Count three. Govt. App. at 775a-876a. Twenty-five of those predicate acts occurred after the Eastern District of Pennsylvania indictment was filed, and three occurred after the filing of the District of Maryland indictment. Grayson App. at 17a-24a. The evidence at trial showed Grayson continued to be involved in illegal drug activity as part of the CCE through July 1983, at least four to five months after the return of the Maryland indictment. Govt. App. at 451a-56a, 693a-95a, 712a-14a.

Accordingly, in view of *Garrett* and under the facts of this case, the admission of Grayson's two prior

conspiracy convictions as predicate acts for the CCE charge did not violate the Double Jeopardy Clause.

B.

Having concluded that Congress intended both RICO and CCE to be separate offenses and that it does not violate the Double Jeopardy Clause under the facts of this case to prosecute the RICO offense and the CCE offense after a prior conspiracy conviction for one of the predicate offenses. the next issue is whether the double jeopardy clause bars cumulative punishments. The district court sentenced Grayson to ten years in prison on counts three, four, six and seven -- the CCE count and its substantive predicate offenses -- to commence at the expiration of Grayson's sentence in the District of Maryland, and five years in prison on Count one, RICO conspiracy, consecutive to the ten year general sentence. As to count two, substantive RICO, the district court suspended imposition of sentence and placed Grayson on five years probation to commence at the expiration of the prison sentences on the other counts. Grayson argues that the sentence imposed by the district court was unlawful on the RICO counts and the CCE count in that the sentence on the RICO counts were made consecutive to the CCE count and both the RICO and CCE counts were made consecutive to the sentence Grayson was already serving for the prior conspiracy conviction in the District of Maryland.

1. *RICO and CCE*

In *United States v. Phillips*, 664 F.2d at 1010-14, the Fifth Circuit held that RICO counts are not lesser included offenses of a CCE charge for double jeopardy purposes. The *Phillips* court stated:

> We conclude that the RICO counts are not lesser included offenses of the § 848 count. Both the

> substantive RICO and RICO conspiracy counts require proof of facts and elements not required to be proved under § 848, even though there is a substantial overlap in the proof offered to establish the crimes. In a substantive or conspiracy RICO prosecution the Government must prove the existence of an enterprise that affects interstate commerce. The existence of an enterprise is an element that is separate from the element of the pattern of racketeering activity in which the enterprise engages; the enterprise is proved by evidence of a continuing organization and by evidence that the members function as a continuing unit. *United States v. Turkette, supra*, 101 S. Ct. at 2528. Mere proof of a pattern of racketeering activity, i.e., commission of at least two acts of racketeering activity, is not sufficient to establish a RICO violation; there must also be proof of the existence of the enterprise itself. Section 848, by contrast, does not require proof of a RICO type enterprise. Rather, § 848 merely requires proof that the defendant undertook a continuing series of violations in concert or in conspiracy with five or more persons.

Phillips, 664 F.2d at 1013-14. Consequently, RICO offenses are separate and distinct from continuing criminal enterprise offenses; hence the consecutive punishments on the RICO and CCE counts did not violate the fifth amendment's double jeopardy clause.

2. *RICO and Predicate Acts -- Sentencing*

As noted earlier, Congress intended to permit the imposition of cumulative sentences for both RICO offenses and the underlying predicate offenses. *Id.* at 1009 n. 55; *Rone*, 598 F.2d at 571; *Hawkins*, 658 F.2d

at 287; *Aleman*, 609 F.2d at 306; *Boylan*, 620 F.2d at 361. Accordingly, it was not improper for the district court to make the sentences on the RICO counts consecutive to the sentence Grayson was already serving for the prior conspiracy conviction in the District of Maryland.

3. *CCE and Predicate Acts -- Sentencing*

Until recently the courts of appeals were divided on the issue whether consecutive sentencing for CCE and its predicate offenses violate the Double Jeopardy Clause. *Compare United States v. Gomberg*, 715 F.2d 843, 851 (3d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984)(double jeopardy bars cumulative sentencing); *United States v. Jefferson*, 714 F.2d 689,.703 (7th Cir. 1983) (same); *United States v. Samuelson*, 697 F.2d 255, 260 (8th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) (same); and *United States v. Chagra*, 669 F.2d 241, 261-62 (5th Cir.), *cert. denied.*, 459 U.S. 846 (1982) (same), *with United States v. Brantley*, 733 F.2d 1429, 1436-37 (11th Cir. 1984), *cert. denied*, ___U.S.___, 105 S. Ct. 200 (1985), (sentencing under § 848 and for a predicate offense not a double jeopardy violation); and *United States v. Mourad*, 729 F.2d 195, 203 (2d Cir.), *cert denied*, ___U.S.___, 105 S. Ct. 180 (1984) (same).

The Supreme Court, however, resolved the issue in *Garrett v. United States*. The Court held that the Double Jeopardy Clause does not bar cumulative punishments for CCE and underlying substantive predicate offense.[8] *Garrett*, ___ U.S. at ___, 105 S. Ct. at

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8. The Supreme Court's holding in *Garrett* that cumulative punishment was appropriate for CCE and substantive predicate offenses clearly overrules our decision in United States v. Gomberg, 715 F.2d at 851, to that extent.

2420. In addressing the cumulative punishments issue, the Court stressed that it did not address conspiracy charges and that *Jeffers* remains the law in that area:

> The focus of the analysis in *Jeffers* was the permissibility of cumulative punishments for conspiracy under § 846 and for CCE under § 848, and the plurality reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties. The same is not true of the substantive offenses created by the [Comprehensive Drug Abuse Prevention and Control] Act [of 1970] and conspiracy, and by the same logic, it is not true of the substantive offenses and CCE.

Id. Jeffers, therefore, stands for the proposition that cumulative punishments for conspiracy under § 846 and for CCE under § 848 violate the double jeopardy clause.

Because the CCE and conspiracy charges are not subject to cumulative punishment, Grayson may not be subjected to sentences for both the CCE and conspiracy conviction. Thus, we must now consider the appropriate remedial measures to be taken. In *United States v. Busic*, 639 F.2d 940, 950 (3d Cir.), *cert. denied*, 452 U.S. 918 (1981), we held that the Constitution does not forbid a district court from resentencing a defendant *de novo* and imposing a more severe sentence if it so chooses. *See Gomberg*, 715 F.2d at 852; and *Government of Virgin Islands v. Soto*, 718 F.2d 72, 75-6 (3d Cir. 1983). In light of *Busic*, Grayson's sentences may be vacated on all counts and the district court may exercise its discretion in resentencing. It is noted that since it is

the "cumulation of sentence" which is illegal, we are not required to vacate Grayson's convictions. *Cf. United States v. Gomez*, 593 F.2d 210, 217 (3d Cir.), *cert. denied*, 441 U.S. 948 (1979); *United States v. Corson*, 449 F.2d 544, 551 (3d Cir. 1971).

In this case, the appropriate course would be to vacate Grayson's sentence on all counts and impose sentences on the non-CCE counts consecutive, if the court continued to consider it appropriate, to Grayson's District of Maryland sentence.[9] Given that

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9. The maximum penalty Grayson faces as to each conviction is as follows:

Count	Offense	Maximum Penalty
One	18 U.S.C. § 1962(d)-RICO conspiracy	20 years and $25,000 fine
Two	18 U.S.C. § 1962(c)-RICO	20 years and $25,000 fine
Three	21 U.S.C. § 848 - CCE	minimum of 10 years and up to life imprisonment without parole, and $100,000 fine
Four	21 U.S.C. § 841(a)(1)-possession with intent to distribute methamphetamine	5 yrs., a $15,000 fine and at least two years special parole
Six	21 U.S.C. § 846-attempt to possess with intent to distribute methamphetamine	5 years and a $15,000 fine
Seven	21 U.S.C. § 846-attempt to possess with intent to distribute methamphetamine	5 years and a $15,000 fine

Note: Counts four, six and seven occurred prior to October 12, 1984, the effective date of the increased penalties under the

Grayson's conspiracy conviction is in the District of Maryland, the district court here cannot impose a general sentence on the CCE count and the Maryland conspiracy conviction. Nor can the court vacate the Maryland conspiracy conviction. Moreover, the district court cannot allow the CCE sentence to run concurrently with the conspiracy sentence. In *Ball v. United States*, ___U.S.___, 105 S. Ct. 1668, 1673 (1985), the Court held that once it is determined that Congress did not intend to punish two offenses cumulatively:

> The only remedy consistent with the Congressional intent is for the district court, where the sentencing responsibility resides, to exercise its discretion to vacate . . . the underlying convictions [or sentences]. The remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intention.

Accordingly, we remand the case with instructions to the district court to vacate Grayson's sentence and, in the exercise of its discretion, to impose appropriate sentences to cover the convictions under Counts one, two, four, six and seven.

Comprehensive Crime Control Act of 1984, Pub.L. 98-473, Title II, §§ 502, 503(b)(1),(2) October 12, 1984, 98 Stat. 2068, 2070. In addition, although Grayson had a prior felony conviction under Subchapter I of Title 21, and therefore qualified for enhanced sentencing under 21 U.S.C. § 841(b)(1)(B), the government did not, before trial, file an information with the court stating in writing the previous convictions to be relied upon, as required by 21 U.S.C. § 851(a)(1). Therefore, the maximum penalty on Counts four, six and seven was only five years and a $15,000 fine. Gov't Supp. Memo at 2-3.

Appendix A

III.

Defendant Giordano challenges the district court's jury instructions. Giordano argues that it was reversible error for the district court to refuse to instruct the jury that a "connection" must be shown among the various predicate acts for the RICO offense, 18 U.S.C. § 1962(c), charged against him in Count two of the Indictment. At trial, the district court judge instructed the jury that: "a pattern of racketeering activity is defined to be two or more acts of racketeering which occurred within ten years of each other." Giordano App. at A-109. Giordano objected to that definition and requested that the district court elaborate on the definition by stating that a connection between the predicate acts is needed to prove a "pattern of racketeering activity". *Id.* at A-132, A-142-43. Because resolution of this issue turns on statutory construction involving the interpretation and application of legal precepts, this court's standard of review is plenary. *Universal Minerals*, 669 F.2d at 102-3.

Section 1962(c) renders unlawful the conduct, "through a pattern of racketeering activity," of the affairs of an enterprise engaged in, or whose activities affect, interstate commerce. 18 U.S.C. § 1961(1) defines "racketeering activity" as any of a large number of specified illegal acts, including "any act which is indictable under the Currency and Foreign Transactions Reporting Act." Finally, 18 U.S.C. § 1961(5) provides that:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of

> imprisonment) after the commission of a prior act of racketeering activity.

At least until recently, courts have differed in their readings of "pattern" for RICO purposes. Some courts have taken the position that any two acts of racketeering by the same enterprise, no matter how unrelated, establish the requisite pattern. *See United States v. Phillips*, 664 F.2d at 1011 (the two predicate crimes need not be related to each other but must be related to the affairs of the enterprise); *United States v. Weisman*, 624 F.2d 1118, 1122-23 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Bright*, 630 F.2d 804, 830 n. 47 (5th Cir. 1980). By contrast, other courts have applied some such requirement of relatedness. *See United States v. Stofsky*, 409 F.Supp. 609, 614 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts); *United States v. Starnes*, 644 F.2d 673, 677-78 (7th Cir. 1981); *United States v. Moeller*, 402 F.Supp. 49, 57-58 (D.Conn. 1975).

The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ___U.S.___, 105 S. Ct. 3275 (1985), although in dictum, has recently supplied the courts with its reading of "pattern" for RICO purposes. The Court stressed that a "pattern" cannot be established without "continuity plus relationship." The Court emphasized the "continuity" point by stating more than once that RICO is not aimed at the isolated offense:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two

acts of racketeering activity." § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969)(emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This

> language may be useful in interpreting other sections of the Act. *Cf. Iannelli v. United States*, 420 U.S. 770, 789, 95 S. Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

Sedima, ___ U.S. at ___ n.14, 105 S. Ct. at 3285 n.14. Other courts have taken a fresh look at the "pattern" issue in light of *Sedima*. *See e.g., Alexander Grant & Co. v. Tiffany Industries, Inc.*, 770 F.2d 717, 718 n.1 (1985); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 831-33 (N.D. Ill. 1985) (several mailings in furtherance of the ongoing kickback scheme did not establish a RICO "pattern"); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F. Supp. 1418, 1421 (W.D. Okl. 1985); *Rojas v. First Bank Nat. Ass'n*, 613 F. Supp. 968, 971 n.1 (E.D.N.Y. 1985) (several isolated acts do not establish a "pattern of racketeering activity" for purposes of a civil RICO claim; there must be a showing of at least two acts of racketeering activity and the threat of continuing activity); *Allington v. Carpenter*, 619 F. Supp. 474, 477-78 (C.D. Cal. 1985).

In the case before us, we may assume, without deciding, that the predicate acts relied upon to support a conviction under RICO must 'have the same or similar purposes, results, participants, victims, or methods of commission, or [must be] otherwise . . . interrelated by distinguishing characterristics,' so as not to be 'isolated events.' *Sedima*, 105 S. Ct. at 3285 n.14. We may make this assumption because the evidence was such that a jury finding Giordano guilty of a RICO violation could only have relied upon predicate acts having the necessary interrelatedness. Accordingly, any error in the charge does not require reversal of Giordano's RICO conviction.

Since the challenged instruction affected no possible Constitutional right, we are not required to

find that any error in the charge was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). Instead, we must apply the "highly probable" standard of appellate review to determine the harmlessness of the error. *Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). "High probability" requires that the court have a "sure conviction that the error did not prejudice the defendant," but need not disprove every "reasonable possibility" of prejudice. *United States v. Jannotti*, 729 F.2d 213, 219-20 & n.2 (3d Cir. 1984). Applying this standard to the circumstances of this case, we hold that the erroneous instruction does not constitute reversible error. F. R. Crim. P. 52(a).

To reach this conclusion, one need only glance at the predicate acts for the RICO offense charged against Giordano in Count two of the Indictment. Paragraph 10 of Count two of the Indictment sets forth seven predicate acts against Giordano ranging in time from Fall 1982 to December 1983. Giordano App. at A-43-45. Six of those predicate acts were presented to the jury.[10] These predicate acts cover incidents and events whereby Giordano allegedly manufactured, possessed, sold and distributed methamphetamine and phencyclidine to various members and associates of the Pagan Motorcycle Club ("PMC"). Giordano was a member of PMC and each of the predicate acts were committed in conjunction with PMC members, at the direction of some PMC members, and as part of the ongoing involvement of Giordano and the PMC in drug activity. Thus, we conclude that Giordano was not prejudiced by the district court's error.

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10. The predicate act in paragaph 10(c) was not submitted to the jury because it incorrectly identifies the drug distributed as phencyclidine rather than methamphetamine. Government App. at 762a-63a.

Appendix A

CONCLUSION

All of the appellants' convictions will be affirmed, as will all of the sentences except those imposed on Michael Grayson. His case will be remanded to the district court, in its exercise of discretion, for vacation of sentence on all counts and imposition of sentences on the non-CCE counts consecutive to Grayson's District of Maryland sentence.

Appendix A

APPENDIX TO OPINION OF THE COURT:

The following contentions, reproduced verbatim from the appellants' briefs, are rejected as without merit. All appellants adopt each other's arguments to the extent they are applicable.

Michael Grayson, appellant in No. 85-1214; John Gavis, appellant in No. 85-1391:

— There was insufficient evidence to sustain a conviction of appellant Grayson on conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO).

— There was insufficient evidence to sustain conviction of appellants on Count II of the Indictment, Substantive Violations of RICO.

— There was insufficient evidence to sustain conviction of appellant Grayson under Count III, Violation of 21 U.S.C. sec. 848.

— The District Court erred in repeatedly permitting Government witnesses to testify to joint understandings of the meanings of conversations.

— Appellant Gavis was denied his Constitutional right to due process of law when in response to a question posed by the jury to the Court requiring the reading back of trial testimony, a critical portion of the requested testimony was not read.

— The Trial Court erred in denying appellant Gavis' motion for severance.

Appendix A

Charles Moore, appellant in No. 85-1217:

— Whether the trial court erred in denying the appellant's motion to sever his trial from that of the co-defendants indicted in the matter before the district court.

— Whether the trial court erred in refusing to instruct the jury, after the defendant had so requested, that the overt acts alleged to have been committed by the defendant, Charles Moore, if found to be one continuous act, would require the jury to acquit him of the RICO charges alleged in the indictment.

Michael Lawless, appellant in No. 85-1218:

— Whether the Trial Court erred in denying Appellant's Motion for severance, Appellant being one of nine Defendants and the evidence presented by the Government was primarily against other Defendants in the case.

— Whether the Trial Court erred in allowing metal detectors at the entrance of the court room, thus causing an aura of fear to permeate the fair and impartial administration of justice to deny Appellant full process.

Charles McKnight, appellant in No. 85-1222:

— The trial court erred in refusing to permit the appellant to present expert testimony concerning the effects of high dosage of drug use on the capacity of witnesses to accurately perceive, remember and communicate reality.

— The trial court erred in admitting a 1977 conviction of the appellant as a predicate continuing criminal enterprise offense when that conviction was not contained in the indictment.

Donald Robinson, appellant in No. 85-1255:

— Did the trial court err in refusing to permit the defendant to plead the defense of entrapment to the jury.

Michael Giordano, appellant in No. 85-1314:

— A prejudicial time variance requires reversal of Count 31.

— The evidence was insufficient to prove the element of Count 2 of "pattern" of racketeering activity where four of six enumerated predicate offenses were not connected to the affairs of the enterprise.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 86-542

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence at trial required that the court instruct the jury on the entrapment defense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 795 F.2d 278.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1986. The petition for a writ of certiorari was filed on September 2, 1986, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c) (Count 1), racketeering conspiracy, in violation of 18 U.S.C. 1962(d) (Count 2), and two counts of attempting to possess methamphetamine with intent to distribute it,

in violation of 21 U.S.C. 846 (Counts 6 and 21). Petitioner was sentenced to concurrent terms of five years' imprisonment on Counts 1 and 2, and a five-year term of probation on Counts 6 and 21.[1]

1. The Pagans Motorcycle Club was a multistate organization that, from a least 1976 to 1982, manufactured and distributed certain controlled substances, principally phencyclidine and methamphetamine (Pet. App. 7a). Petitioner was the Pagans' national treasurer (Gov't App. 33a-34a).[2] In addition, he served as an "advisor" to local chapters of the Pagans in the Philadelphia and southern New Jersey areas (*id.* at 72a). The evidence at trial showed that, throughout the 1976-1982 period, petitioner received presents and small quantities of phencyclidine in exchange for permitting drug distribution to occur through Pagan club contacts and on Pagan club premises (Pet. 4).

In the fall of 1977, Richard Lehr, one of the Pagans' phencyclidine suppliers, asked petitioner for permission to use a middleman in selling phencyclidine to Pagan members (Gov't App. 309a-310a). Lehr indicated that Pagan members had complained about the price and quality of the drugs he was supplying, and Lehr said he believed using a single dealer would improve the distribution situation (*ibid.*). Petitioner declined to act as the middleman himself, but he allowed Lehr to make such an arrangement with Michael Grayson, another Pagan member (*id.* at 310a-313a). Thereafter, Lehr provided Grayson

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[1] Petitioner was indicted together with nine co-defendants. Two of them pleaded guilty, and the others were all convicted at trial.

[2] "Gov't App." refers to the supplemental appendix filed by the United States in the court of appeals.

with approximately 9 to 14 pounds of phencyclidine each week for distribution among the Pagans (*id.* at 313a-316a).

In January 1983, one of the Pagans' former methamphetamine suppliers, James DeGregorio, informed petitioner that he had procured all of the chemicals necessary to manufacture methamphetamine (Gov't App. 235a-236a). DeGregorio asked petitioner to alert his former Pagan customers that he would soon have methamphetamine for sale (*id.* at 236a). DeGregorio promised to give petitioner one pound of methamphetamine for assisting him (*id.* at 268a-269a). Unbeknownst to petitioner, DeGregorio was acting as an informant for federal law enforcement officers at that time (*id.* at 20a-24a).[3]

Several days later, on January 15, 1983, DeGregorio contacted petitioner again and informed him that the methamphetamine was almost ready for sale (Gov't App. 236a-237a). DeGregorio asked if petitioner had contacted any of DeGregorio's former customers (*id.* at 238a). Petitioner replied that he had tried to contact one Pagan member but had failed (*ibid.*). He said that he would continue trying to contact that member and others (*id.* at 238a-239a).

The next day, DeGregorio took 20 pounds of "look-alike" methamphetamine to a Holiday Inn in Essington, Pennsylvania (Gov't. App. 239a-243a). From there, DeGregorio telephoned petitioner and indicated that the methamphetamine was ready for sale (*id.* at 244a-245a). Petitioner stated that he had successfully contacted one

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[3] DeGregorio had been convicted in state court in September 1982 on charges of attempted murder (Gov't App. 21a). While he was in prison, federal officials contacted him and obtained his agreement to act as an informant for them (*id.* at 20a-22a). State authorities temporarily released DeGregorio so that he could work with the federal officials (*id.* at 22a-24a).

Pagan member, Charles McKnight (*id.* at 245a). Later that day, McKnight telephoned DeGregorio and informed him that he had received DeGregorio's message from petitioner and that he wanted to purchase methamphetamine (*id.* at 250a-252a). A short time later, McKnight and Michael Grayson came to the hotel (*id.* at 251a-252a, 260a-261a); each purchased a pound of the "look-alike" methamphetamine (*id.* at 260a, 273a-276a). Later that evening, they returned and purchased another two pounds of the substance (*id.* at 277a-279a).[4]

The following evening, DeGregorio met with petitioner (Gov't App. 282a-283a). At that meeting, DeGregorio gave petitioner a pound of the "look-alike" methamphetamine as payment for assisting him, and petitioner accepted it (*id.* at 290a-291a). Petitioner subsequently sold half of the pound of "look-alike" methamphetamine to Kenneth Weaver, another member of the Pagans (17 Tr. 54).[5]

In his defense, petitioner denied that he was a dealer in drugs or that he had ever conspired to distribute methamphetamine (22 Tr. 191; 23 Tr. 40). Specifically, he testified that he told DeGregorio several times that he did not want the pound of methamphetamine because he "wouldn't know what to do with it" (23 Tr. 38). Nonetheless, petitioner testified, DeGregorio left the drugs in petitioner's van (*ibid.*). Petitioner further testified that, when he gave some of the "look-alike" methamphetamine to Kenneth Weaver a few weeks later, he told Weaver that he "didn't think it was anything" and that he "knew it was garbage, not what it was supposed to be" (*id.* at 39-40).

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[4] Petitioner's conduct in arranging for the sale of the "look-alike" methamphetamine to McKnight and Grayson formed the basis for the charge in Count 6 of the indictment.

[5] Petitioner's possession of a pound of the "look-alike" methamphetamine formed the basis for the charge in Count 21 of the indictment.

At the close of his defense, petitioner requested that the court instruct the jury on the defense of entrapment. The court refused to do so, noting that petitioner had not admitted the elements of the offenses with which he was charged. Pet. 6.

2. The court of appeals affirmed (Pet. App. 1a-32a). It found petitioner's challenge to the district court's refusal to give an entrapment instruction "to be without merit and [to] require no discussion" (*id.* at 5a & n.2).

ARGUMENT

Petitioner argues (Pet. 6-9) that this Court should grant a writ of certiorari to resolve a conflict among the circuits concerning whether a defendant must admit all the elements of a charged offense before he is entitled to raise the defense of entrapment.[6] The evidence petitioner produced, however, would not entitle him to an entrapment instruction in *any* circuit. Accordingly, this case is not an appropriate vehicle for addressing the issue petitioner raises.

The courts of appeals uniformly hold that, before an entrapment instruction may be given, a defendant must "make some showing of both inducement [by the government] and lack of predisposition [by the defendant]" (*United States* v. *Nations,* 764 F.2d 1073, 1079 (5th Cir. 1985)). See also *United States* v. *Busby,* 780 F.2d 804, 806 (9th Cir. 1986); *United States* v. *Luce,* 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Rhodes,* 713 F.2d 463, 467 (9th Cir.), cert. denied, 464 U.S. 1012 (1983); *United*

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[6] The Ninth Circuit has held that a defendant can argue both that he did not commit the unlawful acts charged against him and that, if he did, he was entrapped. See *United States* v. *Demma,* 523 F.2d 981 (1975) (en banc). Other courts of appeals have held that such inconsistent pleading is impermissible. See *United States* v. *Smith,* 629 F.2d 650 (10th Cir.), cert. denied, 449 U.S. 994 (1980); *United States* v. *Shoup,* 608 F.2d 950 (3d Cir. 1979).

States v. *Bagnell,* 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). Thus, unless there is some evidence of "overreaching inducive conduct on the part of the government" (*United States* v. *DeVore,* 423 F.2d 1069, 1071 (4th Cir. 1970)), and an "unreadiness" on the defendant's part (*United States* v. *Annese,* 631 F.2d 1041, 1047 (1st Cir. 1980)), no circuit allows the entrapment defense to be sent to a jury. See also *United States* v. *Brooks,* 567 F.2d 134, 142 (D.C. Cir. 1977) (Robinson, J., dissenting). In this case, the evidence was insufficient on both issues.

There was no evidence at trial that the government coerced or pressured petitioner to commit the charged offenses. See *United States* v. *Luce,* 726 F.2d at 49; *United States* v. *Bagnell,* 679 F.2d at 835. Petitioner testified that DeGregorio solicited his assistance in the distribution of the "look-alike" methamphetamine. But solicitation alone does not establish "inducement" by the government; there must be some evidence of at least "mild persuasion or coercion" (*ibid.*). Petitioner did not suggest that DeGregorio pressured him to contact McKnight (see 23 Tr. 35), so there is no basis whatsoever for his entrapment claim as to the charge of aiding and abetting the attempted possession of methamphetamine on January 16. And petitioner's brief testimony about DeGregorio's conduct in giving him the pound of methamphetamine on January 18 does not suggest that DeGregorio coerced or pressured petitioner in any way. The most petitioner's testimony suggests is that DeGregorio wanted petitioner to have the methamphetamine and that petitioner said he did not want it and would not know what to do with it (23 Tr. 38). After DeGregorio had allegedly left the drug in petitioner's van, petitioner admits he maintained possession of the drug for several weeks, after which he distributed part of it to Weaver (23 Tr. 38-40). Thus, even taking petitioner's testimony as true, the evidence was insufficient to support

petitioner's claim that he was pressured by an agent of the government to commit the offenses with which he was charged.[7]

Nor did the evidence in any way support petitioner's contention that he was not predisposed to commit the crimes for which he claims he was entrapped. See *United States* v *Nations,* 764 F.2d at 1080; *United States* v. *Rhodes,* 713 F.2d at 467. On the contrary, the record contains "overwhelming evidence of his predisposition" (*ibid.*). Petitioner was a member of the drug distribution enterprise well before DeGregorio solicited his assistance in the "look-alike" methamphetamine distribution scheme: petitioner aided and abetted Lehr's distribution of phencyclidine in 1977 and, more generally, allowed the distribution of drugs through club contacts and on club premises throughout the 1976-1982 period. Furthermore, the record shows that DeGregorio had good reason to contact petitioner in 1982 and to offer him a pound of the "look-alike" methamphetamine in exchange for assisting in its distribution: petitioner had accepted presents and small quantities of drugs throughout the 1976-1982 period in exchange for facilitating the distribution of controlled substances to Pagan members. Although petitioner disputed the evidence of his drug activities in his own testimony, he made a number of damaging admissions that

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[7] Rather than supporting a defense of entrapment, petitioner's testimony appears to have been designed to support a very different defense. As to the telephone call to McKnight, petitioner testified that he did not know that DeGregorio was contacting McKnight for purposes of arranging a drug deal (see 23 Tr. 131). As to petitioner's possession of the pound of "look-alike" methamphetamine, petitioner testified that he did not initially accept the drug. Instead, he testified that DeGregorio left it for him in his van. After he discovered that he had the substance, petitioner said, he doubted that it was methamphetamine, and therefore claimed that he never had the intent to possess a controlled substance (23 Tr. 39-40).

undermined his claim that he was not predisposed to possess methamphetamines. In particular, he admitted that he had used phencyclidine regularly and that he had used methamphetamine as well (22 Tr. 192-193; 23 Tr. 78-81). He also admitted that he had held supplies of methamphetamine for DeGregorio on other occasions (22 Tr. 193). In addition, petitioner testified that DeGregorio and another drug distributor had regularly given him supplies of phencyclidine, which petitioner had on occasion distributed to others (*id.* at 204, 215-218, 220, 222; 23 Tr. 10, 84). Thus, the evidence in the record does not remotely support petitioner's contention that he was an unpredisposed victim of coercive pressure by a government agent.

Where, as here, the defendant has not met his initial evidentiary burden, he is not entitled to an instruction on the entrapment defense. See, *e.g.*, *United States* v. *Sarmiento,* 786 F.2d 665 (5th Cir. 1986). Thus, regardless of whether a defendant can properly assert inconsistent defenses in an entrapment case, petitioner has failed to establish his entitlement to an entrapment charge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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